M/S SOH BOK YEW & SONS SDN BHD A

v.

M/S KOKO BUDI SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU B
KAMARDIN HASHIM JC
[ORIGINATING SUMMONS NO: 24-3717-2008]
10 FEBRUARY 2009

COMPANY LAW: *Meetings - Calling of meetings - Power of High Court to order a meeting - Circumstances where such power may be exercised - Companies Act 1965, s. 150* C

This was an application by the plaintiff for, *inter alia*, the following orders; (a) that the first defendant convene an extraordinary general meeting of the first defendant; (b) that one member being present in person or by proxy shall constitute a quorum for the purposes of the said extraordinary general meeting. The plaintiff company was a shareholder in Koko Budi Sdn Bhd (Koko Budi), the first defendant company holding 3,188,000 shares. The other shares were held in the names of the second defendant and the third defendant. The plaintiff had only one representative in the Board of Directors of the said Koko Budi. The second and third defendants were the other remaining two directors. Due to the provisions of the Articles of Association of Koko Budi, the plaintiff was not in a position to call for a directors meeting or a general meeting of 'Koko Budi' by virtue of such meeting being inquorate (lack of quorum) in the event of the absence of the other two directors or as stated shareholders. It was the requirement of the Companies Act 1965 that it required request of two shareholders to enable any general meeting to be properly requisitioned. In the circumstances, the plaintiff was helpless in being unable to requisition a general meeting or a directors meeting on its own for lack of a valid quorum. Due to the helpless position of the plaintiff and in order to play an effective role in the governance of 'Koko Budi', the plaintiff sought to have two of its nominated representatives appointed to the Board of 'Koko Budi.' However, due to the second and third defendants refusing, failing and neglecting to attend the meetings and by sheer lack of quorum, the plaintiff's request and rights as a majority shareholder remained thwarted. The plaintiff had exhibited various documents pertaining D E F G H I

to the requisition for an extraordinary general meeting of 'Koko Budi', the attendance sheets, notices and letters to which there was no response from the second and third defendants. It was also stated that the affairs of Koko Budi due to the quorum requirements to pass directors resolution effective meant that the interests and rights of the plaintiff remained illusory. Therefore, the plaintiff sought intervention of this court to grant the relief pursuant to s. 150 of the Companies Act 1965.

Held (allowing plaintiff's application):

(1) Section 150 of the Companies Act 1965 confers power to the court to order a meeting if for any reason it was impracticable to call a meeting in any manner as provided by the Articles of the Association or the Act. In this present case, Article 65 of the Articles of Association of Koko Budi requires two members personally present or by proxy shall be a quorum for a general meeting. Further, art. 115 says that a resolution can only be valid and effectual if it is signed by a majority of the directors or not less than two directors. Here, the second and third defendants being the other two directors of Koko Budi refused to attend the EGM. The conduct of the defendants in refusing to attend to the meetings pursuant to the notice properly issued had resulted in the quorum provisions being incapable of being complied with which had resulted in a deadlock situation. It was impracticable to call and conduct a meeting in the manner prescribed by the Articles of Association or the Act. This was an appropriate case for the exercise of the power conferred upon the court by the said s. 150. (paras 10, 12, 13 & 14)

Case(s) referred to:
Low San Siang v. Lee Kim Yong [1999] 1 CLJ 529 HC ***(refd)***
Phuar Kong Seng v. Lim Hua [2004] 8 CLJ 478 HC ***(refd)***
Re E1 Sombrero Ltd [1958] 3 All ER 1 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 150

For the plaintiff - Meyappan Pillai (Alvin Teo with him); M/s Meyappan Pillai Assoc
For the defendant - YM Raja Saidatul (Mr Nazri with her); M/s Abdul Raman Saad & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Kamardin Hashim JC:

[1] This was an application by the plaintiff for the following orders:

(1) That the 1st defendant do convene an extraordinary general meeting of the 1st defendant within seven (7) days of an order being made herein, or on such other date as the Honourable Court may order, for the purpose of considering and if deemed fit to approve with or without modification the resolutions set out in schedule 1 hereto;

(2) That the said meeting be summoned by giving of not less than seven (7) days notice by sending the said notice of meeting to all the shareholders by prepaid mail to their last known address as provided for in Article 131 and Article 132 of the Articles of Association of the 1st defendant, and that such notice of the said meeting be deemed to have been duly given two days after the posting of the same;

(3) That Soh Chee Siong being a director of the said 1st defendant be appointed as Chairman of the said meeting;

(4) Such further and or other directions as to the manner in which the said meeting is to be called held and conducted and all such ancillary and consequential directions as the Honourable Court may deem expedient;

(5) That one member being present in person or by proxy shall constitute a quorum for the purposes of the said extraordinary general meeting;

(6) That all parties be at liberty to apply;

(7) That provisions be made for the costs of this application; and

(8) Such further or other order as this Honourable Court deems fit or just to grant.

[2] This application was filed on 18 December 2008 in encl. 3 with a certificate of urgency. The grounds in support of the application can be seen in encl. 4 where a director of plaintiff company one Mr. Soh Chee Siong affirmed the affidavit on 17 December 2008. Mr. Soh Chee Song deposed that he was a

director of the plaintiff company and duly authorized to sworn the affidavit on behalf of the company. The plaintiff company is a shareholder in M/s Koko Budi Sdn. Bhd. (Koko Budi), the 1st defendant company holding 3,188,000 shares which amount to an 84.79 per centum stake. The other shares are held in the names of the 2nd defendant, Soh Chee Leong (being 500,000 shares or 13.30 per centum stake) and Soh Peck Lay (being 72,000 shares or 1.91 per centum stake), the 3rd defendant. Notwithstanding that the plaintiff holds an 84.79 per cent stake it has only one representative in the board of directors of the said 'Koko Budi', namely Mr. Soh Chee Siong. The 2nd and 3rd defendants are the other remaining two directors in the said 'Koko Budi'.

[3] It was also deposed that due to the provisions of the Articles of Association of 'Koko Budi', the plaintiff is not in a position to call for a directors meeting or a general meeting of 'Koko Budi' by virtue of such meeting being inquorate (lack of quorum) in the event of the absence of the other two directors or as stated shareholders. It is the requirement of the Companies Act 1965 that it requires request of two shareholders to enable any general meeting to be properly requisitioned. In the circumstances, notwithstanding being a majority shareholder, the plaintiff is helpless in being unable to requisition a general meeting or a directors meeting on its own for lack of a valid quorum. Article 115 of the Articles of Association of 'Koko Budi' as amended on 2 August 2001 provides that any resolution passed by any two directors shall be valid and effectual as if it had been passed at a meeting of the directors duly convened and held. Due to the helplessness position of the plaintiff and in order to play an effective role in governance of 'Koko Budi', plaintiff had sought to have two of its nominated representatives appointed to the board of 'Koko Budi'. However, due to the 2nd and 3rd defendants refusing, failing and neglecting to attend the meetings and by sheer lack of quorum the plaintiff's request and rights as a majority shareholder remains thwarted. Plaintiff exhibited various documents pertaining to the requisition for an extraordinary general meeting of 'Koko Budi', the attendance sheets, notices and letters to which there was no response from the 2nd and 3rd defendants. It is also stated that the affairs of 'Koko Budi' due to the quorum requirements to pass directors resolutions effectively means that the interests and rights of the plaintiff remain illusory. Therefore plaintiff seeks the intervention of this Honourable Court to grant the relief pursuant to s. 150 of the Companies Act 1965.

[4] The defendants resisted the application and filed an affidavit in reply in encl. 5 which was affirmed by the 2nd defendant on 23 January 2009. In his affidavit in reply the 2nd defendant on behalf of all the other defendants admitted that they refused to attend all the meetings (EGM's) because the sole purpose of the EGM is for the plaintiff to expel 2nd and 3rd defendant in order to have full control of 'Koko Budi'. Paragraph 5 and 6 of 2nd defendant affidavit read as follows:

> 5. Saya mengaku kandungan 9 Afidavit Plaintif setakat mana ia menyatakan bahawa saya dan defendan Ketiga enggan menghadiri mesyuarat-mesyuarat yang ingin diadakan oleh Plaintif. Ini adalah kerana tujuan dan hasrat sebenar Plaintif seperti yang dinyatakan sendiri dalam perenggan 9 tersebut ialah untuk menguasai Syarikat Defendan Pertama dan seterusnya memecat saya dan Defendan Ketiga sebagai ahli-ahli lembaga pengarah syarikat Defendan Pertama. Ini adalah konsisten dengan perbuatan Plaintif dalam syarikat-syarikat yang berkaitan seperti Stamford Raffles Sdn. Bhd. dan juga Soh Bok Yew & Sons Sdn. Bhd. dimana saya telah dipecat sebagai pengarah berikutan niat jahat pemegang-pemegang saham majoriti syarikat-syarikat berkenaan dan sekaligus menghapuskan penglibatan saya sebagai pengarah.
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> 6. Saya sesungguhnya percaya bahawa plaintif menyalahgunakan proses mahkamah untuk mencapai niat jahatnya iaitu untuk menguasai pengurusan syarikat Defendan Pertama dan juga memecat Defendan Ketiga dan saya sebagai pengarah.

[5] The plaintiff's counsel submitted that there is a deadlock situation in this case and for that reason parliament had enacted s. 150 of the Act in order to break the deadlock. In this deadlock situation it was impracticable to call and conduct a meeting in the manner prescribed by the Articles or the Act and that this was an appropriate case for the exercise of the power conferred upon the court by s. 150 of the Act.

[6] With regard to the defence counsel's suggestion that the meeting to be held after resolving the issue of payment of dividends involving another sister company, Stamford Raffles by the Sea ('SR') amounts to defendants imposing conditions which is against the ambit of s. 150 as the matter involving another company, which is a separate entity and totally a different matter altogether.

[7] Another issue raised by the defendant's counsel is that this move by the plaintiff is to take over control of 'Koko Budi' and this will silent the minority shareholders. Plaintiff's counsel submitted that this is not a valid reason in not allowing this application and should be rejected by the court. Counsel for the plaintiff submitted that it is a basic principle of company law that the majority rule prevails. It was also submitted that court should not go into the affairs of 'SR' as that matter has properly been before the High Court in Muar.

[8] The defendant's counsel submitted that this application should not be allowed as the move is a tactical move for plaintiff to take control of 'Koko Budi'. By doing that the defendants will be prejudiced as they would be losing their right to veto, and that they will be oppressed as a minority shareholder of 'Koko Budi'. However defendant's counsel admitted that there was a deadlock situation in this case. Defendant's counsel also suggested court to give an ancillary order by allowing EGM to be held after account of 'SR' have been finalized. This suggestion is strongly objected by plaintiff's counsel on the ground that if it is allowed it will defeat the purpose of s. 150 of the Act. Plaintiff's counsel further said that the defendant's counsel submission with regard to matters involving 'SR' are mere speculations which was not supported by any affidavit evidence. Defendant's further affidavit alleging facts involving 'SR' was rejected earlier by the court as it was filed late and out of time as this matter was fixed for hearing earlier on 5 February 2009 but was adjourned to today (10 February 2009) as defendant's counsel asked for more time to prepare their case. Defendant intended further affidavit was only filed on the hearing date which is fixed by the court to hear both sides submission thus was rejected by this court on the ground of delay and was viewed as a technical monuvere to delay the proceeding further.

[9] Section 150 of the Companies Act 1965 provides as follows:

> 150. If for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the articles or this Act the Court may, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or of the personal representative of any such member, order a meeting to be called held and conducted in such manner as the Court thinks fit, and may give such ancillary or

consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting.

[10] This provision of the law confers power to the court to order a meeting if for any reason it is impracticable to call a meeting in any manner as provided by the Articles of the Association or the Act. The burden is on the plaintiff to prove the impracticable facts as said by His Lordship Abdul Malik Ishak (as he then was) in the case of *Low San Siang v. Lee Kim Yong* [1999] 1 CLJ 529 at p 533-534 as follows:

Now, when confronted with an application like encl. 4 grounded on s. 150 of the Companies Act 1965, the first and foremost question to pose would be: Whether the desired EOGM can be conducted? Here, surely the onus would be on the plaintiff to show to this court that it was impracticable to call for a meeting of the company in any manner whatsoever or even to conduct the meeting in the manner as prescribed by the Articles of the company (*Leong Ah Hong v. Hup Seng Co. Ltd.* [1963] MLJ 164, 165). Article 46 of the Articles of Association of the company states that:

> No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business. Save as herein otherwise provided, two members present in person shall be a quorum. For the purpose of this regulation 'member' includes a person attending as a proxy or as representing a corporation which is a member.

and clearly "two members present in person shall be a quorum". Here, the defendant refused to attend the EOGM and surely this court has the discretion to call for such EOGM with a quorum of one as sought for by the plaintiff in encl. 4.

[11] Earlier in the judgment, His Lordship quoted Wynn - Parry J in *Re E1 Sombrero Ltd.* [1958] 3 All ER 1 which are reproduced below:

The first point of law which arises involves the construction of section 135(1), the examination being directed to consider the scope of the phrase:

> If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the articles or this Act ....

It is to be observed that the sub-section opens with the words 'If for any reason', and, therefore, it follows that the sub-section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words being 'it is impracticable to call a meeting of a company', the question arises, what is the scope of the word 'impracticable'? It is conceded (certainly it was conceded below) that the word 'impracticable' is more limited than the word 'impossible', and it appears to me that the question necessarily raised by the introduction of the word 'impracticable' is merely this: Examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held. On the face of section 135(1), there is no express limitation which would operate to give those words 'is impracticable' any less meaning than that which I have stated, and I can find no good reason in the arguments which have been addressed to me on behalf of the respondents for qualifying in any way the force of the word 'impracticable' or the interpretation which I have placed on it, and, therefore, on the point I am in favour of the applicant.

[12] In our present case, Article 65 of the Articles of Association of Koko Budi requires two members personally present or by proxy or represented by attorney shall be a quorum for a General Meeting. Further, Article 115 as amended talks about a resolution can only be valid and effectual if it is signed by a majority of the Directors or not less than two directors. Here, the 2nd and 3rd Defendants being the other two directors of Koko Budi refused to attend the EGM. As said by Zaleha Zahari J (as she then was) in the case of *Phuar Kong Seng v. Lim Hua* [2004] 8 CLJ 478 in allowing similar application, as follows:

> It is a basic principle of Company law that the corporate will is advanced by resolution of the company in general meeting in matters in which the general meeting is competent to act and that the majority of members control the decision-making in the company by the exercise of its voting power. A related principle is that voting rights are in the nature of property and members may exercise this power in their own interest.

I am satisfied, taking into consideration all of the facts and circumstances of this case that it was impracticable to call for a meeting of Chemfert in the manner prescribed by its Articles of Association or the Act. The company, Chemfert, clearly cannot function without the intervention of the court.

[13] There are similar situation in our case where the conduct of the defendants in refusing to attend to the meetings pursuant to notice properly issued had resulted in the quorum provisions being incapable of being complied with which has resulted in a deadlock situation. It was impracticable to call and conduct a meeting in the manner prescribed by the Articles of Association or the Act and that this was an appropriate case for the exercise of the power conferred upon the court by s. 150.

[14] For the above stated reasons, I allowed plaintiffs application in encl. 3 and granted an order in terms of prayers 1, 3 and 5. I also directed that 14 days' notice be given to the defendants and their solicitors of such meeting. I also order that each party to bear their own costs.